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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/757,175	01/14/2004	Thomas M. Walraven	LTTKP0116US	4188

7590 06/16/2004

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Cleveland, OH 44115

EXAMINER

FRANCIS, FAYE

ART UNIT	PAPER NUMBER
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3712

DATE MAILED: 06/16/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/757,175

Applicant(s)

WALRAVEN, THOMAS M.

Examiner

Faye Francis

Art Unit

3712

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 11, 16-18 and 20-22 is/are rejected.
- 7) ☒ Claim(s) 5-10, 12-15 and 19 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 14 January 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_.

### **DETAILED ACTION**

1. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the a Xylophone in claim 20 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

Art Unit: 3712

3. Claims 2-3 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

With respect to claims 2 and 3: the claims phrases “the striker attachment location is spaced inwardly from the ends of the striker by at least one fifth the length of the striker” and “the striker attachment location is spaced inwardly from the ends of the striker by at least one fourth the length of the striker” are confusing. For example, how can the striker attachment location be spaced inwardly from both ends of the striker by at least one fifth at the same time?

***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claims 1 and 21 rejected under 35 U.S.C. 102(b) as being anticipated by Eubanks.

Eubanks discloses in Fig 1, a game call apparatus on which the claimed toy percussion instrument and toy reads. It comprises an instrument body/main unit 14, a striker/implement 12 for striking the instrument body to produce a sound, and a tether [an attachment member 68] connecting the striker to the instrument body, wherein the tether has one end connected to the instrument

Art Unit: 3712

body at a body attachment/ implement attachment location, and an opposite end connected to the striker/implement at a striker attachment location [where the tether is attached to the striker], the striker attachment/ implement location being spaced inwardly from the ends of the striker/implement.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1-4, 11, 18 and 21-22 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Epple alone or in view of Eubanks.

Epple discloses in Figs 1-12, a on which the claimed toy percussion instrument and toy reads [the device is inherently capable of being struck]. It comprises an instrument body/main unit [rigid friction element 17], a striker/implement [striker rod element 26] for striking the instrument body to produce a sound having a rounded striker/implement portion, a striker attachment/ implement location [the striker weight element 27] and a handle end portion [Fig 12] and a tether [col 4 lines 20-21]. Additionally, Epple discloses that the position of the striker weight element 27 can be adjusted anywhere on the rod 26 by moving the striker weight element up or down on the striker rod to obtain varying sounds.

Art Unit: 3712

Should Epple be later deemed not to meet claims 1, 11 and 21-22 because Epple does not explicitly disclose that the tether has one end connected to the instrument body/main unit and at the opposite end connected to the striker/implement, Eubanks teaches that it is conventional to attach a striker to a body of a sounding instrument utilizing a tether. It would have been obvious to one of ordinary skill in the art at the time the invention was made, in view of Eubanks to attach the striker/implement in the device of Epple to its instrument body/main unit in order to prevent losing the striker/implement.

8. Claims 16-17 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Epple in view of Eubanks as applied to claims 1-4, 11, 18 and 21-22 above and further in view of Luckenbach.

Modified device of Epple discloses most of the elements of these claims but for the instrument body/main having a shape of an animal such as a turtle.

Luckenbach is cited to show a desirability to provide a sounding toy in the shape of an animal. It would have been obvious to further modify the shape of the device of Epple to simulate an animal as taught by Luckenbach in order to make the toy more fun to play with. Additionally, it would have been obvious to make the device to look like a turtle in order to make the toy more fun to play with, for aesthetic reasons or as a matter of obvious design choice. The further modification of the shape of the instrument body/main in modified device of Epple to simulate a turtle would especially be obvious since the applicant discloses no advantage or critical need for the specific shape [see specification page 7].

Art Unit: 3712

***Allowable Subject Matter***

9. Claims 5-10, 12-15 and 19 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

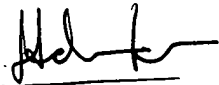
***Conclusion***

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Faye Francis whose telephone number is 703-306-5941. The examiner can normally be reached on M-F 6:30-3:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Derris Banks can be reached on 703-308-1745. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

FF

  
Jacob K. Ackun  
Primary Examiner

